No. 81-2191

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IN THE

Supreme Court of the United States

October Term, 1982

ROBERT J. MAYBERRY,

Petitioner,

v.

WILLIAM DEES, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE FOURTH CIRCUIT COURT OF APPEALS IMPROPERLY ALLOCATED TO PETITIONER THE BURDEN OF ESTABLISHING HIS FIRST AMENDMENT CLAIM?

II. WHETHER THE COURT OF APPEALS PROPERLY DETERMINED THAT THE EVIDENCE BEFORE THE JURY DID NOT SUPPORT ITS VERDICT?

LIST OF PARTIES

The Petitioner in this proceeding is Robert J. Mayberry, a former member of the faculty of East Carolina University, one of the sixteen constituent institutions of the University of North Carolina. Respondents are present and former officials of the University of North Carolina and East Carolina University. They are:

William Dees, former Chairman of the Board of Governors of the University of North Carolina, who is a party in his official capacity only.

William Friday, President of the University of North Carolina, who is a party in his official capacity only.

Robert Morgan, former Chairman of the Board of Trustees of East Carolina University, who is a party in his official capacity only.

Leo W. Jenkins, former Chancellor of East Carolina University, who is a party in both his official and individual capacities.

Robert L. Holt, former Vice Chancellor for Academic Affairs at East Carolina University, who is a party in both his official and individual capacities.

Robert W. Williams, former Provost of East Carolina University, who is a party in both his official and individual capacities.

Richard Capwell, former Dean of the College of Arts and Sciences at East Carolina University, who is a part in both his official and individual capacities.

Joseph Fernandez, former Chairman of the Department of Romance Languages at East Carolina University, who is a party in both his official and individual capacities.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully request this Court to deny the petition of Robert J. Mayberry for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on November 5, 1981.

OPINIONS BELOW

Petitioner instituted an action against Respondents in the United States District Court for the Eastern District of North Carolina in 1973 in which he alleged that Respondents had violated his constitutional rights of procedural due process, freedom of speech and equal protection of the law in denying him tenure as a member of the faculty of East Carolina University (ECU). At various times, Petitioner has asserted that his complaint also contains a pendent State claim for breach of contract, though Respondents have consistently contested that assertion.

A jury trial was held in August of 1978. During the course of the trial, Respondents were granted directed verdicts on the procedural due process and equal protection claims. The

free speech and contract claims were submitted to the jury and the jury returned a verdict in the Petitioner's favor. The judgment of the District Court is reprinted as Appendix C to the Petition for Writ of Certiorari.

Both parties filed post-judgment motions. Petitioner requested the Court to alter and amend its judgment to grant him reinstatement in addition to monetary damages and Respondents moved for judgment notwithstanding the verdict or, in the alternative, a new trial. All these motions were denied. The District Court's Order is set forth as Appendix B to the Petition for Writ of Certiorari.

Both parties appealed to the Fourth Circuit Court of Appeals. On January 15, 1981 an opinion[1] was issued by two judges of the Fourth Circuit.[2] Both parties petitioned for rehearing and those petitions were granted by order of the Fourth Circuit dated March 18, 1981. The final opinion of the Fourth Circuit is reported at 663 F.2d 502 (4th Cir. 1981) and is reprinted as Appendix A to the Petition for Writ of Certiorari. Subsequent motions by the Petitioner for rehearing and rehearing *en banc* were denied by the Court. These orders are reprinted as Appendices D and E to the Petition for Writ of Certiorari.

After an extension of time, the Petitioner sought review of the final decision of the Court of Appeals by way of petition for writ of certiorari. This brief in opposition to the grant of certiortari is filed by Respondents at the request of the Court.

STATEMENT OF THE CASE

Petitioner was employed as an assistant professor in the Department of Romance Languages at East Carolina University (ECU) from 1967 to 1973. During the six (6) years that Petitioner was employed as an assistant professor, he taught Spanish undergraduate courses, though his doctoral

[1] This opinion is reported at 638 F.2d 690 (4th Cir. 1981) but is not included as an Appendix to the Petition for Writ of Certiorari. Because of the later grant of rehearing this decision appears only in the advance sheets, not in the final published volume.

[2] After oral argument, one judge withdrew because of a possible conflict of interest.

dissertation was a study of an old French poem. (A. IV, 172)[3] He was denied tenure in the spring of 1972.

The Respondent, Dr. Joseph F. Fernandez became Chairman of the Department of Romance Languages in the Fall of 1968. His tenure as chairman was distinguished by his success in raising the standards of the department. (A. IV, 205) During this time, however, the department, in particular, and ECU, in general, experienced a decline in student enrollment. This decline in student enrollment was beyond Dr. Fernandez's control. (A. IV, 205) Indeed, universities throughout the country suffered from a considerable decline in student enrollments during that period which necessitated the elimination of foreign language teaching positions. (A. IV, 78)

This decline in enrollment began during the academic year 1970-1971. (A. III, 60) Enrollment then abruptly plummented during the 1971-1972 academic year, the year in which Petitioner was denied tenture. (A. IV, 157) More precisely, student enrollment in the department declined 37.6% from the 1969-1970 academic year to the 1971-1972 academic year. (A. III, 60) This precipitous decline necessitated, among other things, the reassignment of Spanish teachers to monitor the language laboratory because there were not enough classes for them. (A. III, 60)

During the 1971-1972 academic year, Respondent Dr. Robert W. Williams Jr., then Provost of ECU, informed Respondent Dr. Richard L. Capwell, then Dean of the College of Arts and Sciences, that declining student enrollment necessitated a staff reduction in the Department of Romance Languages. (A. IV, 176-1977) Dean Capwell then informed Dr. Fernandez of this need. (A. IV, 189) Dr. Fernandez executed this direction from the administration. Between the 1970-1971 academic year and the 1974-1975 academic year the faculty was reduced from twenty-nine (29) to eighteen (18), a reduction of staff in excess of 25% (A. III, 60)

In the spring of 1972, regulations of ECU required that decisions be made in regard to the award of tenure to five (5)

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[3]This citation is to the Appendix filed by the parties in the Fourth Circuit by volume and page number.

faculty members in the department. These decisions were "up or out" decisions, i.e, decisions whether tenure and permanent employment would be granted or whether term contracts would be allowed to expire. These five faculty members included the Petitioner and the Petitioner's wife.

In making his recommendations, Dr. Fernandez considered confidential evaluations of these five (5) faculty members prepared by six (6) professors in the department. The collective judgment of these six professors was that Petitioner was the least qualified of the five (5) faculty members under consideration. (A. III, 6-17) Two (2) evaluations recommended granting Petitioner tenure only in order to retain his wife. (A. III 7, 13) Only one (1) recommendation endorsed Petitioner for tenure without qualification. (A. III, 9)

Dr. Fernandez's opinion regarding Petitioner's qualifications coincided with the collective judgment of his colleagues. In July of 1970, Dr. Fernandez noted in regard to Petitioner "Although friendly and likable I should have my doubts about tenure since his is so opposed to my objectives for the department."[4] (A. III, 6) Similarly in May of 1971, Dr. Fernandez noted, "If reduction in staff is forced upon us, would hesitate to give him tenure. Otherwise, would not object." (A. III, 14) These views were noted before the events which gave rise to Petitioner's free speech claim.

Despite the Petitioner's undistinguished academic record, Dr. Fernandez anguished over the decision whether to grant him tenure because of the abilities of Petitioner's wife. He consulted with Dr. John Howell, then Dean of the Graduate School, and Dean Richard Capwell. Dr. Fernandez was instructed that his tenure decision regarding the petitioner should be made on the merits and not because his wife, Dr. Nancy Mayberry, was a valuable asset to the department. (A. IV, 112-13, 145-146, 189-191)

Dr. Fernandez concluded that Petitioner was the least deserving of tenure of the five persons under consideration and because of the need to reduce the size of the staff decided not to recommend the award of tenure to

[4]The objectives to which Dr. Frenandez refers is the use of foreign language in the classroom by teachers.

Petitioner. (A. IV, 143-144; III, 4-5) On April 13, 1972 Dr. Fernandez so advised Dean Capwell. In his letter to the Dean, Dr. Fernandez stated, "[b]ecause of the need to reduce the size of the staff of the Spanish faculty, it is recommended that [Dr. Robert Mayberry] not be granted tenure." (A. IV, 33-34)

Petitioner's wife, of course, was recommended for tenure. She has since been promoted to the rank of associate professor, granted salary increases and awarded an East Carolina Research Council Grant. (A. IV, 27-28). Both prior to and after being granted tenure, Dr. Nancy Mayberry openly voiced her professional differences with Dr. Fernandez in professional meetings. (A. IV, 33-34)

The Petitioner presented no evidence to rebut the fact that he was the least deserving of tenure among those granted tenure in the spring of 1972. (A. III, 4-5; IV, 143-144) He did present evidence that though he holds the Ph.D. degree and was denied tenure, Professor Esther Fernandez, who was granted tenure the preceding year, only holds the M.A. degree. However, Professor Esther Fernandez is an "excellent classroom teacher whose classes have always ranked above the mean for each group in the departmental final examinations, most of them significantly above the mean." (A. II, 34) In any case, the decision to grant tenure to Professor Esther Fernandez in the spring of 1971, but to deny tenure to the Petitioner in the spring of 1972 "was made against an entirely different background. In Dr. Mayberry's case the Romance Languages Department had to cut back on its staff and had to choose among the then untenured faculty in order to accomplish the reduction. There was no such necessity a year earlier when Mrs. Fernandez was granted tenure." (A. III, 65)

The student evaluations by senior Spanish majors likewise reveal that the Petitioner's teaching performance was among the lowest in the department. (A. III, 18-39). For example, a comparison between the Petitioner's and Professor Esther Fernandez's student evaluations reveals that in each instance, except one, the student gave higher marks to Professor Esther Fernandez's. The one exception was an evaluation which gave both of them an identifcal rating.

In the years prior to the 1971-72 academic year, Dr. Fernandez and Petitioner disagreed over the proper amount

of Spanish, rather than English, which should be used by faculty members in the classroom in teaching upper-level courses. Under the standards established by Dr. Fernandez, with which Petitioner disagreed, upper-level courses were to be conducted primarily in Spanish. This disagreement was resolved by the oral agreement of Petitioner to abide by the departmental standard as established by Dr. Fernandez. (A. III, 2; IV, 39-41)

During the academic years prior to 1971-1972, Petitioner had other objections to the manner in which Dr. Fernandez administered the department but in keeping with his *ex parte* style did not make these objections known to Dr. Fernandez. (A. IV, 42-47). These objections may well have been personal, rather than professional, in origin for the Petitioner did not view Dr. Fernandez as his professional equal. (A. II, 62)

During the fall semester of 1971, the events which form the basis for Petitioner's First Amendment claim began to unfold. That semester, the one prior to the denial of tenure to Petitioner, Dr. Fernandez established the membership of the Organization and Administration Committee for Self-Study of the department (hereinafter "Committee"). The membership of the Committee consisted of Dr. Fernandez, Professor Esther Fernandez, his wife, another faculty member and a student. This Committee was responsible for summarizing the *annonymous* questionnaries submitted by the foreign language faculty and for transmitting the findings to the Southern Association of Colleges and Schools, the regional accrediting body. The Petitioner privately expressed his displeasure over this matter to a number of his colleagues. He believed that the Committee structure would stifle opinions expressed in the anonymous questionnaire. (A. IV, 48-51) He did not express those views to Dr. Fernandez.

Encouraged by her husband, Dr. Nancy Mayberry wrote an *anonymous* letter to Mr. Charles Brown, the Chairman of a University-wide steering committee for the self-study. (A. IV, 16, 52) In her letter, she complained that the structure of the Committee was suppressing freedom of speech (A. IV, 17) The Petitioner, himself, subsequently went to Mr. Brown regarding his wife's anonymous letter (A. IV, 52), but that meeting, as well as the contents of the anonymous letter,

remained *undisclosed.* (A. IV, 200-201) Dr. Fernandez, nevertheless, became aware of some unrest within the department, though the nature and source of the unrest were unidentified. (A. IV, 19)

The Self-Study Report, which consisted of anonymous faculty comments summarized by Dr. Ferandez and other members of the Committee (A. IV, 15), contained some remarks which could be construed as cirtical of Dr. Fernandez. (A. IV, 163) The only portion of the Self-Study Report introduced into evidence stated the following:

> CONCERN
> "No attempt was made to guarantee anonymity of faculty comments when replying to the administration and organization questionnaire. Therefore, replies had to guarded to avoid reprisals."
>
> RECOMMENDATION
> "Answers to individual questionnaries would have been more candid if they had been sent to the accrediting association. Actually, deans and chairmen could write and get the 'desired' results." (A. II, 96), (A. IV, 53)

The presence of the above-quoted remarks, critical of Dr. Fernandez's Committee assignments, in a summary prepared by Dr. Fernandez and the Committee are their own self-refutation. The Petitioner presented no evidence that his own anonymous questionnaire was critical of Dr. Fernandez in any respect, much less critical along the lines of the above-quoted remarks.

Dr. Fernandez was unaware of the Petitioner's criticisms of him, whatever they might have been, during the period of the self-study and up to the time he made his recommendations for tenure on April 13, 1972. (A. IV, 151-152) Dr. Fernandez was, however, possibly aware that the Petitioner was not very happy with his performance as chairman prior to making the tenure recommendations. (A. IV, 161) In May 1972, the month after the denial of tenure to the Petitioner, Dr. Fernandez did receive a memorandum from another faculty member who mentioned that the Petitioner had been critical of him during the period of the self-study. (A. IV, 152)

The Petitioner presented no evidence that any of his critical remarks about Dr. Fernandez's departmental policies and decisions were remarks which did or could affect either the department's or the University's accreditation assessment by the Southern Association of Colleges and Schools. Nor did the Petitioner present any evidence that either the department or the University was in danger of losing its accreditation.

The Petitioner, subsequent to his tenure denial, did complain to the Chairman of the Visiting Team from the Southern Association that he was denied tenure because he had "spoken out". (A. IV, 73-74) The Visiting Committee Report states, however, that "[n]o reported cases of infringement on academic freedom were revealed in conversations with administrators, faculty, AAUP executive committee and students." (A. III, 93) The Report further observed that "the College is making a commendable effort to reduce course offerings in some disciplines which have not experienced the growth aniticpated or, indeed, have declines in registrations, notably, in the areas of modern language and history." (A. III, 92)

Neither the Petitioner, his wife, nor anyone else went to the Dean or any other administrator prior to the denial of tenure to complain about Dr. Fernandez's departmental decisions and policies. They had the right to do so. (A. IV, 26, 80-81, 192-193) Nor did anyone in the department go to the Dean and tell him that he feared reprisals if he criticized Dr. Fernandez. (A. IV, 193-194)

After the Petitioner was denied tenure in April 1972, he largely abandoned his policy of criticizing Dr. Fernandez *ex parte* and began openly attacking him. He sent Dr. Fernandez an impertinent memorandum (A. IV, 160) and belatedly complained about irregularities in the tenure granting process the previous year. (A. III, 40) He voiced his criticism of Dr. Fernandez's failure to hold a committee meeting (A. III, 41) and disagreed with Dr. Fernandez over a textbook matter. (A. II, 42) He accused Dr. Fernandez of failing in his responsibility to his colleagues and told him, "If you can't stand the heat, get out of the kitchen." (A. III, 48)

Later the Petitioner changed his tactics and wrote Dr. Fernandez a letter of apology. In the apology letter the

Petitioner pledged *"henceforth* to remove [himself] completely from any action aimed at [his] *embarrassment* ... and [that he] deeply regret[ed] [his] *unkind actions."* (A. III, 49) (emphasis added).

REASONS FOR DENYING THE WRIT

In the spring of 1972 regulations in effect at ECU required "up or out" decisions to be made in regard to Petitioner and four other faculty members, i.e, they were to be granted tenure or their term contracts allowed to expire. On the basis of his performance, Petitioner was judged by his colleagues and department chairman as the faculty member in this group of five least deserving of the award of tenure. Faced with a direction to reduce the size of the faculty in the department, the only logical and reasonable decision open to the chairman of the department was to deny the grant of tenure, with its consequent permanency of employment, to the petitioner. That decision was made and the Fourth Circuit Court of Appeals correctly determined that the evidence before the jury would support no other conclusion.

I. PETITIONER'S ARGUMENT THAT THE CIRCUIT COURT IMPROPERLY ALLOCATED THE BURDEN OF PROOF MISPERCEIVES THE ISSUE BEFORE THE CIRCUIT COURT AND IS WITHOUT MERIT.

In *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274 (1977) this Court laid down the order and burden of proof to be followed in evaluating the claim of a public employee that his employment was ended because of his exercise of his freedom of speech. Petitioner argues that the Circuit Court violated these principles in setting aside the jury verdict for him. Specifically, Petitioner argues that the Circuit Court, in the course of its reasoning, placed upon him the burden of proving that speech protected by the First Amendment was a "substantial" or "motivating" factor in the decision to not award him tenure and, contrary to *Mt. Healthy,* the additional burden of proving that he would have been awarded tenure in the absence of his protected speech.

Petitioner's argument is without merit and should be rejected. First, this argument ignores the issue before the

Circuit Court. Second, this argument misreads and takes out of context isolated portions of the Circuit Court's opinion.

The issue for resolution by the Circuit Court was whether the jury's verdict should be permitted to stand; not whether the District Court erred in its instructions to the jury on the burden of proof or otherwise misplaced the burden of proof. In addressing this issue it was the obligation of the Circuit Court to give the petitioner the benefit of all reasonable inferences which could be drawn from the evidence. See, e.g., *Brady v. Southern Railway Co.*, 320 U.S. 476, 479-480 (1943) and 9 Wright & Miller, *Federal Practice and Procedure*, § 2524. A fertile source of inferences in cases in which an employee alleges that he has been illegally terminated from employment is the evaluation of the employee's performance prior to the events which give rise to his claim. See, e.g., *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792, 804 (1973). Evidence of this type was before the jury in this case. If the Petitioner's propsects for tenure before the events which gave rise to his claim were good, it could reasonably be inferred from his failure to receive tenure that some outside factor intervened. On the other hand, if his prospects for tenure were not good, it could reasonably be inferred that his failure to receive tenure followed in the natural course of events and was not influenced by an extraneous factor. In determining whether the jury's verdict was supported by the evidence it has incumbent upon the Circuit Court to evaluate this evidence and the inferences which flow from it.[5]

In effect then, Petitioner in arguing that the Circuit Court improperly allocated the burden of proof, faults the Court for searching the evidence and examining inferences which could support his jury verdict. He cannot have it both ways.

Moreover, there is nothing in the Circuit Court's opinion to support the Petitioner's claim that the Court improperly allocated the burden of proof upon him in reviewing evidence potentially supportive of the jury verdict. In an effort to establish this claim, he has taken certain statements

[5]This process did not entail any "weighing" of the evidence because Petitioner presented no evidence in rebuttal of the collective judgment of Petitioner's colleagues that he was the least deserving of the five candidates for tenure in the spring of 1972.

by the Court out of context. According to the petitioner:

> "[W]hen the Court undertook its 'statistical analysis' it identified two elements of the 'causality percentage of the case, for which Mayberry, as plaintiff, had the burden of proof' (19a) but had failed to prove: one of the elements was petitioner's likelihood of receiving tenure in the absence of protected speech (18a)." (Petition, p. 13, n. 13)

The Circuit Court's "statistical analysis" appears in one section of the its seven-part analysis of the sufficiency of Petitioner's evidence to withstand a motion for judgment notwithstanding the verdict. The "statistical analysis" itself is illustrative only.[6] That portion of the "statistical analysis", from which petitioner takes bits and pieces, states:

> "That is, the causality percentage of the case, for which Mayberry, as plaintiff, had the burden of proof was but 4/10ths of 1%. Put another way, it is 99.6% certain that denial of tenure was not associated with the protected criticism. In the real, everyday world, the residual 4/10ths of 1% is less than a scintilla, and the case falls for failure of proof." (Petition, p. 19a)

This statement is in no way inconsistent with *Mt. Healthy*. The Circuit Court simply stated that the burden of proof was on the plaintiff to establish that his exercise of his freedom of speech was a substantial and motivating cause of his denial of tenure. And on that burden, the plaintiff failed.

Petitioner's second and final illustration of the alleged improper allocation of the burden of proof upon him by the Circuit Court is the following:

> "We are loath to say that there was no First Amendment dimension whatever to utterances by Mayberry so that, even had the evidence sufficed

[6]The Circuit Court's "statistical analysis" is prefaced by the following statement: "The law is a study and function of human life, not an exercise of automatons. It is, consequently, an aggregate of approximations, not an exact science. So a resort to percentages to demonstrate a point is only to provide an illustration, not to suggest the sufficiency of the evidence can be reduced to such mathematical precision." (Petition, 2. 18a)

> to support a finding that, if Mayberry's criticisms had not been made, Fernandez demonstrably was prepared to recommend him favorably for tenure, still Mayberry could not have recovered. See *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979)" (Petition p. 35a).

This statement by the Circuit Court appears in the section of the opinion addressing Respondent's argument that Petitioner's remarks were not protected by the First Amendment. This sentence may contain complex phraseology, but it does not indicate that the Circuit Court imposed on Petitioner the burden of proving that he would have received tenure even in the absence of his criticisms. This sentence, in respondent's view, simply reflects the Fourth Circuit's opinion that it could not hold that Petitioner's private criticisms of his department chairman (protected under *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), were a factor in the tenure decision.

In sum, the Fourth Circuit was presented with the issue of whether the evidence was sufficient to support Petitioner's jury verdict. Critical evidence and inferences on that issue related to and flowed from Petitioner's past performance. In examing this evidence and the inferences which flow from it, the Court did not impose any burden of proof upon the Petitioner. The illustrations relied upon by the Petitioner do not indicate the contrary.

II. THE COURT OF APPEALS PROPERLY OVERTURNED THE JURY VERDICT FOR THE PETITIONER.

Petitioner attacks the action of the Circuit Court in overturning the jury verdict for him on a broad front. In essence, however, his argument is that the Circuit Court improperly weighed the evidence before the jury and deprived him of inferences from the evidence to which he was entitled. Petitioner's argument is not well founded.

Whether evidence is sufficient to create an issue of fact for a jury is solely a question of law. *Baltimore and Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1934). And there is no bar to an appellate court granting judgment notwithstanding the verdict. *Neely v. Martin K. Eby Const. Co., Inc.*, 386 U.S. 317,

322 (1967). The standard to be applied in deciding whether a jury verdict should be permitted to stand was succinctly described by this Court in *Galloway v.U.S.*, 319 U.S. 372, 395 (1942).

> "The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general information, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

Petitioner's case is based on inferences. He draws inferences which he argues are reasonable and thus sufficient to support the verdict for him. But an examination of the facts establishes that the inferences he draws are unreasonable, unsupported by the evidence and, thus, insufficient to support the verdict. *Id.* At most, his verdict is supported by a scintilla of evidence and that is not enough. *Gunning v. Cooley, 281 U.S. 90, 94 (1930); Boeing Co. v. Shipman,* 411 F.2d 365 (5th Cir. 1969).

Petitioner may not hold his jury verdict unless there are reasonable inferences from which it may be concluded that a "substantial" or "motivating" factor in the decision of Dr. Fernandez not to recommend the award of tenure to the Petitioner was criticism protected by the First Amendment. *Mt. Healthy v. Doyle, supra.* Under the circumstances of this case, there are two possible sources of inferences to support the Petitioner's verdict. The first source is the strength of Petitioner's propsects for tenure, from which it may be inferred that tenure would flow, or not flow, in the absence of intervening events. The second source is the decisionmaker's knowledge of the protected criticisms prior to making his decision, from which it may be inferred that such criticisms were, or were not, a part of the decisionmaker's reasoning.

There are no facts which support any reasonable inference that Petitioner's prospects for tenure were good. In the spring of 1972 five (5) members of the Romance Languages Department were required to be evaluated for tenure by their senior colleagues and a recommendation for

tenure made by the department chairman. The criteria to be applied were teaching, service and scholarship.

These five persons were Professors Morales, Ambert, Ellenberg, Nancy Mayberry and Petitioner. Manual Morales was judged by his colleagues to be "an effective classroom teacher" with "publications in print" who had received "excellent marks" on senior evaluations (A. III, 4). He was recommended for tenure. Gary Ambert was thought by his colleagues to have special value to the department because of his work in the language laboratory and was unanimously recommended for tenure (A. III, 4). Grace Ellenberg was viewed as a "truely outstanding teacher" whose classroom performance was "extraordinary" (A. III, 4). She, of course, was recommended for tenure. Petitioner's wife, Dr. Nancy Mayberry, was "a successful teacher" and "a promising scholar". Her colleagues recommended her for tenure, though not unanimously (A. III, 5).

Petitioner's performance stands in sharp contrast. As reported by Petitioner himself, his professional activities during the period of his employment were largely limited to teaching. (A. III, 67-84) And his teaching ability, as evaluated by departmental seniors, was judged to be poor. (A. III, 18-19) In fact, several seniors during this time gave his teaching a grade of D (A. III, 20, 21, 26) and several cited his teaching as "especially bad". (A. III, 36-39) Petitioner's colleagues largely shared this judgment. He was evaluated by them as a faculty member with "limited potential" who was lazy" and "who could be more energetic and enthusiastic about classes". [A. III, 7, 8, 10, 12, 13) Their recommendations to the chairman regarding the award of tenure to Petitioner were mixed and focused upon the benefit to the department in retaining Petitioner's wife, not the value of Petitioner's own contributions. (A. III, 7, 10, 11, 13)

Dr. Fernandez' judgment coincided with that of his colleagues and was formed long before the events which gave rise to this lawsuit. In July of 1970, Dr. Fernandez expressed "doubts about tenure" for Petitioner and in May of 1871 noted, "if reduction in staff is forced upon us, would hestitate to give him tenure." A reduction in the size of the staff did in fact become necessary. During the 1971-72 academic year, the administration determined that declining

student enrollment necessitated a reduction in the staff of the department. In the face of this need for reduction in staff size, Dr. Fernandez determined that Petitioner was the least deserving of tenure of the persons under consideration for tenure during that year and recommended to the administration that Petitioner not receive tenure because of the need for reduction in the size of the staff.

These facts are unrebutted and lead to the single logical conclusion that tenure was not in the cards for the Petitioner. Any other inference is illogical and at odds with the unrebutted evidence that Petitioner's performance was not sufficient to justify the award of tenure.

Petitioner, of course, claims that his poor performance was unrelated to the adverse tenure decision and that this decision was made because of his criticism of Dr. Fernandez in connection with the departmental self-study undertaken as a part of the accreditation of ECU by the Southern Association of Colleges and Schools. In examining this claim it is important to define its scope. There are indications in the record that Petitioner was critical of Dr. Fernandez on a number of issues, but the criticism which Petitioner contends is protected by the First Amendment and which motivated Dr. Fernandez to deny him tenure was that Dr. Fernandez was "autocratic" and had "stacked" the departmental committee appointed to review the administration of the department for purposes of the self-study (Petition, p. 4). Thus, the issue for resolution here is whether any reasonable inference exists to support a conclusion that a substantial and motivating factor in Dr. Fernandez' decision to not award Petitioner tenure was Petitioner's criticism of Dr. Fernandez because he "stacked " this committee. It is Respondents' position that no reasonable inference exists that Dr. Fernandez even knew of this criticism prior to making his recommendation on April 13, 1972 and, therefore, that this criticism could not have been a substantial and motivating factor in that decision.

Petitioner relies upon three excerpts from the testimony at trial to support his position. Thomas Williams, a professor in the department, testified as follows:

A: "Prior to that tenure decision, Dr. Fernandez asked me if I had any recommendation for

individuals in the department who might be worthy of promotion to a higher rank. Among other names, I suggested Professor Robert Mayberry.

"Q: All right. Did the Chairman Fernandez have any remarks to make about your suggestion?

"A: He did not react to the other names, but he said that Professor Mayberry was out of the question because he was a troublemaker.

"Q: All right. Did he define what he meant by troublemaker or have any further discussion about that?

"A: At that time, I was so surprised that he would say that — it was so out of keeping with my own experience that I simply did not pursue the conversation further at that particular moment." (A. IV, 94-95)

No inference reasonably supportive of Petitioner's claim can be drawn from this testimony. The conversation was about promotion, not tenure. It occurred at an unspecified time, but probably the winter of 1971 (A. IV, 96). Most importantly, this testimony provides absolutely no basis upon which to draw any inference whether Dr. Fernandez viewed the Petitioner as a "troublemaker" at that time for any reason related in any way to the "stacking" of the Self-Study Committee.

Other testimony from Thomas Williams provides the second leg of Petitioner's argument Mr. Williams further testified:

> "At that time [after the tenure decision], Professor Fernandez said to me, 'No. Professor Mayberry was a troublemaker', and then he went on to specify that during the self-study, Professor Mayberry had said and made critical remarks about the department and that he could not have someone like that tenured in the department." (A. IV, 95).

Like Dr. Williams' other testimony, this testimony is unsupportive of any reasonable inference in Petitioner's favor. It indicates that Dr. Fernandez knew before the tenure decision that Petitioner had been *critical of the department*, not Dr. Fernandez himself. It provides no clue as to the type or nature of critical remarks by the Petitioner of which Dr. Fernandez was aware and, most importantly, leaves totally unanswered the question of whether Dr. Fernandez knew of these criticisms prior to his decision on April 13, 1972.

Petitioner finally relies upon testimony from his wife (who, despite her own criticism of Dr. Fernandez, was granted tenure at the same time the petitioner was denied tenure.) She stated:

> "I asked why he had been so cruel as to grant me a job and not my husband. He waived a copy of the Self-Study at me and began reading comments from it. I knew who made these comments. I knew your husband was a troublemaker; that it was your husband who was going around the department stirring up trouble for me and having people make these comments. But now, I wonder if you were the one, that you were also critical .... I pointed out that that was what we were supposed to do. We were supposed to, according to the Southern Association, answer that faculty questionnaire honestly-that he had done nothing wrong in doing that." (A. IV, 22-23)[7]

Like the testimony of Thomas Williams, the testimony of Petitioner's wife may provide a source for speculation, but it provides no source for any reasonable inference. Her testimony is that Dr. Fernandez knew of her husband's criticisms after the tenure decision, but her testimony shed no light on whether he knew of these criticisms before he made his decision. Equally important, her testimony relates solely to the Self-Study Report and sheds no light whatsoever upon the time at which Dr. Fernandez, if ever, learned that

[7]Interestingly, Petitioner's wife, in an affidavit filed earlier in this case, referred generally to this conservation but did not state that Dr. Fernandez made any connection between the self-study and his decision to deny Petitioner tenure. (See A. IV, 52)

Petitioner had been critical of him for "stacking" the Self-Study Committee.

In sum, the testimony upon which Petitioner relies leaves unanswered the crucial question of whether Dr. Fernandez knew prior to April 13, 1972 that Petitioner was critical of him for allegedly stacking the Self-Study Committee. One can always speculate as to when Dr. Fernandez learned of the Petitioner's criticisms, but as this Court admonished in *Galloway v. U.S., supra*, "speculation [cannot be] allowed to do duty for probative facts."[8]

Beyond the merits of his case before the jury, Petitioner also argues that the Circuit Court unsurped the jury's function by weighing the evidence and judging the credibility of witnesses, particularly in regard to Dr. Fernandez' knowledge of Petitioner's criticisms. In support of this argument, Petitioner identifies occasional references by the Circuit Court to evidence as weak or attenuated. (Petition, p. 15) To characterize this evidence as weak or attentuated is simply to state the obvious and is not indicative of the weighing of evidence by the Circuit Court. Moreover, to describe the Petitioner's evidence on the critical issue before the jury as weak or attentuated is to give it too much credence.

In a final effort to lend substance to his position, the Petitioner argues that the Circuit Court violated this Court's decision in *Tennant v. Peoria* and *P.U. Railway Co.*, 321 U.S. 29 (1944) in taking the case from the jury when the evidence is in an "even balance". (Petition, p. 17-20) Petitioner seeks to create error where none exists.

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[8]Other testimony by Petitioner and his wife provides a clear answer to the time Dr. Fernandez learned of the Petitioner's criticism. Upon receiving the adverse tenure decision in April, Petitioner visited Dr. Fernandez to find out the basis for his decision. That meeting was uneventful and included no reference to the self-study. Dr. Fernandez simply responded to Petitioner "that he was sorry, that he had to cut a position." (A. IV, 109-110) Later, in May, at a meeting with the administration, Nancy Mayberry "spoke out" against Dr. Fernandez and "told the Deans what was going on in our department" (A. IV, 22) Dean Capwell gave Dr. Fernandez "a full report" of everything Nancy Mayberry said. This was Dr. Fernandez' *first* knowledge of the Mayberry's criticism and then and only then did he act in an angry and vindictive manner. He called Nancy Mayberry to his office in June, demanded that she "prove her allegations" (*Id.*) and, lashed out at the Mayberrys.

The rule for which Petitioner advocates is the rule in the Fourth Circuit and was applied in this case. The Fourth Circuit has specifically rejected the notion that when the evidence and inferences from that evidence are in equipose a case should be taken from the jury. In *Ford Motor Co.v.McDavid*, 259 F.2d 261, 266 (4th Cir. 1958), the Court said:

> "The old notion that a jury should not be allowed to draw any inference from circumstantial evidence, if the one is probable as the other, has fallen into discard and has been replaced by the more sensible rule that it is the province of the jury to resolve conflicting inferences from circumstanctial evidence. Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the Court to withdraw the case from the jury when the necessary inference is so tenuous that it rests upon speculation and conjecture."

McDavid and other cases to the same effect, were cited and relied upon by the Circuit Court in the same paragraph from which the Petitioner derives his "even balance" argument. (Petition, pp. 14a-15a) To read the Circuit Court's opinion in these circumstances as adopting an "even balance" rule is totally unwarranted. Instead, the Circuit Court, in accordance with *Tennant* and *McDavid*, simply held, as it stated, that a "mere possibility" that something occurred is not sufficient to support a jury verdict.

CONCLUSION

Tenure is not a right; it is a status only conferred upon faculty members of demonstrated competence. Petitioner was provided the opportunity to demonstrate to his colleagues and students that he possessed the required competence, but he failed. Now, he would have the Courts substitute a manufactured constitutional claim for his failure and give him the tenure he does not deserve.

The Fourth Circuit clearly saw through this ruse and correctly rejected the Petitioner in his endeavors. In a final effort to gain the tenure he does not deserve, Petitioner seeks to draw inferences at odds with the facts and with reason, and to create error where none exists. His efforts should be rejected and his petition denied.

Respectfully submitted, this 19th day of August, 1982.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI were served upon counsel for Petitioner by depositing said copies in the United States Mail, postage prepaid, addressed as follows:

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This 19th day of August, 1982.

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